United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

CORRECTED COPY

76-1113

B
P/S

United States Court of Appeals

FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA,

Plaintiff-Appellee,

against

FRANCISCO ADRIANO ARMEDO-SARMIENTO, aka Eduardo Sanchez, aka Pacho el Mono, aka Elkin, aka Francisco Velez, EDGAR RESTREPO-BOTERO, aka Omar Hernandez, aka el Sobrino, aka Edgar, LEON VELEZ, JORGE GONZALEZ, aka Jorge Arbolede, LIBARDO GILL, aka Ramiro Estrada, RUBEN DARIO ROLDAN, CARMEN GILL, aka Carmen Estrada-Restrepo, aka Carmen Mazo, WILLIAM RODRIGUEZ-PARRA, aka Jairo, OLEGARIO MONTES-GOMEZ,

Defendants-Appellants.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF OF APPELLANTS WILLIAM RODRIGUEZ-PARRA AND OLEGARIO MONTES-GOMEZ

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Questions Presented

I. Did the court below err in failing to give defendants PARRA and GOMEZ credit for time served in Federal custody prior to sentencing?

II. Should defendants be given credit for time spent in Federal custody from their arrest on June 11, 1973?

III. Did the court err in not dismissing the Indictment because of a variance between proof and Indictment?

IV. Did the court err in failing to dismiss the Indictment for Pre-Indictment delay?

V. Defendants adopt all other arguments of counsel and in particular defendant BOTERO's argument with respect to piecemeal prosecution.

STATEMENT PURSUANT TO RULE 28 (3)

Preliminary Statement

Appellants, WILLIAM RODRIGUEZ-PARRA and OLEGARIO MONTES-GOMEZ appeal from a judgment of the United States District Court, Southern District of New York (Cannella, J.) convicting them of conspiring to import, distribute and sell narcotics in violation of 21 USC 812, 841, 952 and 960.

Appellants were sentenced to a period of imprisonment of ten (10) years and a Special Parole term of six (6) years, the sentences to run concurrent with a ten (10) year Federal sentence imposed in Texas in August, 1973.

Facts

Appellants PARRA and GOMEZ respectfully refer this Court to appellants' joint brief for a general overview of the Government's case.

At the sentencing of appellant PARRA, on March 5, 1973, the following colloquy took place between the Court and Counsel: (A-141-143)[1]

> "The Court: In passing this sentence, I have not lost sight of the fact that he (Parra) has been in jail approximately two years

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[1] "A" references are to Joint Appendix pages.

and seven months. I have taken that into consideration and in the sentencing that I imposed I have given him credit for that ... I would have given him more time if I didn't know that he had been in jail for two years and seven months, and the sentence is as of today, to run concurrently with sentence that he is presently serving.

Mr. Levenson: Does he get credit for the time served from June of 1973 until the present time?

The Court: I have given him credit in my sentence already by imposing ten years in my sentence. I took that into consideration.

In other words as far as I am concerned, this sentence is ten years from today, to run concurrently with the sentence that he is presently serving in Texas, or where he is sentenced now...?

Although, at appellant GOMEZ' sentencing there was no mention by the Court that this defendant did or did not get credit for the time he had served in Texas or the time spent awaiting trial on the instant case, this Point is being written under the assumption that the Court intended to sentence GOMEZ as he did PARRA, to wit: Ten Years to commence as of the date of sentence on March 5, 1976 without credit for time served in the Texas case or for time spent in Federal custody awaiting trial in this case.[2]

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[2] It should be noted that the actual judgment and commitment order [A-99,100] for both PARRA and GOMEZ dated March 5, 1976 filed with the Clerk provides, in pertinent part, as follows: (continued p.3)

Appellants were both arrested while importing cocaine into the United States in San Antonio, Texas on June 11, 1973. They have been in Federal custody since their arrest. The complaint filed against them alleged violations of Federal Narcotic Laws and conspiracy to violate those laws.

Appellants were merely indicated for substantive counts and not for conspiracy.

On May 11, 1974, approximately eleven (11) months later, appellants were again indicated under Indictment 74 CR 494 (see Appellants' Joint Statement of Facts, p. 5).

Indictment 74 CR 494 was subsequently superceded and became the instrument by which appellants were ultimately tried.

> "The defendant [Parra and Gomez] is hereby committed to the custody of the Attorney General or his authorized representative for imprisonment for a period of ten (10) years to run concurrently with sentence defendant is presently serving in Texas. Defendant is placed on Special Parole for a term of six (6) years to commence upon expiration of confinement pursuant to Title 21 US Code Section 841."

(Again, neither of these orders which were signed by Judge Cannella for both PARRA and GOMEZ incorporated the trial court's express language in the case of GOMEZ that in sentencing him the Court took into consideration the time spent in jail in Texas and in jail awaiting trial in this case. However, it is felt that it may just have been an oversight on the part of the person who typed the said judgment and commitment order and to avoid any future issue on the matter this Point is included in this brief).

POINT I

THE COURT BELOW ERRED IN FAILING TO GIVE DEFENDANTS FARRA AND GOMEZ CREDIT FOR TIME SERVED IN FEDERAL CUSTODY PRIOR TO SENTENCING.

Section 3568 of Title 18, United States Code, currently provides:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory, or jail for service of such sentence. The Attorney General shall give any such person credit toward service of his sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed. As used in this section, the term "offense" means any criminal offense,other than an offense triable by court-martial, military commission, provost court, or other military tribunal, which is in violation of an Act of Congress and is triable in any court established by Act of Congress.
>
> "If any such person shall be committed to jail or other place of detention to await transportation to the place at which his sentence is to be served, his sentence shall commence to run from the date on which he is received at such jail or other place of detention.
>
> "No sentence shall prescribe any other method of computing the term." (Emphasis Supplied)

Prior to the amendment of Section 3568, there was a split of authority as to the scope of this statute.

Several circuits only applied it to cases where there was a mandatory minimum sentence. Other circuits recognized the proviso as authorizing the courts to credit a defendant with time served on lesser crimes towards a mandatory minimum. The amendment clarified this conflict and now requires credit for all presentence custody in connection with the offense or acts for which sentence was imposed. Cipes, Criminal Defense Techniques, Vol. 2 (1967).

It is submitted by appellant that if the court had imposed the maximum sentence, in this case, 15 years, then the failure of the Trial Court to give credit for time served would clearly be error as being in excess of the statutory maximum. See Morris-Lee v. United States, 400 F.2d 185 (9th Cir. 1968).

The threshhold question is, Does the Trial Court have the power not to give the defendant credit for time served when less than the maximum sentence is imposed and the Judge specifically states that he has taken the time spent in custody by defendant into account?

A reading of the legislative history of this section which was part o the Bail Reform Act of 1966 (P.L. 89-465) is most illuminating. Thus, the proposed bill (S.1357 89th Congress, 1st Session, Report No. 750)

which contained section 3568 of Title 18 U.S.C., provided in part, as follows:

> "The sentence of imprisonment of any person convicted of an offense shall commence to run from the date on which such person is received at the penitentiary, reformatory or jail for service of such sentence. Any person shall be given credit toward service of his sentence [illegible]ny day spent in custody in connection with the offense for which sentence was imposed . . .: Provided, that no such credit shall be given if the Judge in imposing such person's sentence of imprisonment or fine, takes into consideration the number of days such person has spent in custody in connection with the offense for which such sentence . . . is imposed, and so records in his judgment (Emphasis Supplied).

After extensive committee hearings by the Committee on the Judiciary of the House of Representatives, the bill that finally became law, to wit: Section 3568 of Title 18 U.S.C., did not include the underlined language quoted above.

The reason for the deletion can possibly best be summed up by reading part of the statement by Ramsey Clark,then Deputy Attorney General of the United States, made during the hearing on the proposed Federal Bail Reform Act:

> "The second major area requiring amendment is section 4 of S 1357, which would amend 18 U.S.C. 3568 to broaden the credit against sentence for time spent in custody. We agree with its intent but recommend three changes to make it fully effective. The changes are

> already incorporated in the text of section 4 of H.R. 10195. S. 1357 now gives credit only for time spent in jail in connection with"the offense for which *** sentence *** is imposed." We suggest adding language to give credit also for detention based on the offense for which the person "was arrested." Without this amendment a person might receive no credit for time spent in custody if he were arrested on a serious charge but convicted and sentenced only for a lesser included offense.(Emphasis Supplied)
>
> "In addition we urge removal of S. 1357's proviso in section 3568, which would eliminate any credit "if the judge, in imposing *** sentence *** takes into consideration the number of days such person has spent in custody *** and so records in his judgment." (Emphasis Supplied).
>
> This proviso would leave open the door to precisely the kind of uneven and inequitable credits against sentence that have given rise to the need for the legislation. The type and term of sentence should remain in the complete discretion of the trial court; but the amount of credit against sentence should automatically be fixed at 100 percent of the time spent in custody. This can best be accomplished administratively by placing responsibility to record appropriate credit for such sentenced offender by the Attorney General."

It is clear that what the Trial Judge did was exactly what the new section 3568 was intended to prevent.

It was not for the Court to decide who would or would not be given credit for time served but rather for the Attorney General and the Attorney General alone to compute administratively the time spent in custody.

Indeed a careful reading of the sentencing minutes reveals that the Court's failure to give credit for time served awaiting sentence the case of PARRA was almost an afterthought coming only after defense counsel sought clarification. But for counsel's inquiry, there would be no question as to appellants receiving the credit mandated by the statute.

Indeed, at the sentencing of GOMEZ, no mention was made about the fact that in sentencing GOMEZ to 10 years, the time he had spent in jail had already been taken into account. In addition, on neither judgment was this fact recorded. What happened in the instant case is precisely what the amendment to Sec. 3568 was intended to prevent, to wit: "The uneven and inequitable credits against sentence that have given rise to the need for legislation."

Certainly, the words of the Court in Morris-Lee v. United States, supra, at page 189, can apply here:

> "Since the effective date of the June 22, 1966 amendment the Attorney General is required to give a prisoner 'credit toward service of sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed.' The giving of credit is not a judicial act but is an administrative act, like credit for

work or for good behavior. The credits apply against the sentence as imposed and cannot be implemented by tampering with the sentence itself . . . " (Emphasis Supplied).

POINT II

APPELLANTS SHOULD BE GIVEN CREDIT FOR TIME SPENT IN FEDERAL CUSTODY FROM THEIR ARREST ON JUNE 11, 1973.

The secondary question raised by appellants' sentence is, from what date must they be given credit for time spent in Federal custody? Clearly, the date of their indictment on May 11, 1974 is a minimum cut off date. However, a more equitable and logical date would be the date of their arrest 11 months earlier. On June 11, 1973 they were arrested followed quickly by their pleas of guilty and their sentence on August 30, 1973.

The charge for which the appellants were arrested in Texas was both Conspiracy to import and the actual importation and possession of 1543 grams of cocaine from Mexico as set forth in the pre-indictment complaint (PG-1,2).[3/]

The acts for which appellants were sentenced were in part the importation of cocaine from Colombia,

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3. "PG" references are to pages in the PARRA-GOMEZ appendix attached to this brief.

through Mexico at the behest of the Bravo Group (J-16).[4/] It matters little in view of the legislative history of Sec. 3568 that appellants did not plead guilty to the charge that they were arrested for nor even that they were not indicted for said charge. Nor does it matter that the charge for which appellants were convicted of in the instant case differed from what they pleaded guilty to in Texas.

The charge for which the defendants PARRA and GOMEZ were convicted in the instant case was conspiracy; however, this conviction was based on overt act No. 25 (A-30) which alleged the possession of the same cocaine in San Antonio to which defendants pleaded guilty in Texas.

There is little doubt that if defendants were tried in New York on one indictment alleging conspiracy and a substantive count and were found guilty the sentences imposed would run concurrently.

Is it fair or just to have a situation where the conviction in the Southern District is based on conspiracy but the one Overt Act committed by the defendants is the identical act for which they were indicted in

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4. "J"references are to appellants joint brief.

Texas? Is it fair that where they pleaded guilty to the unlawful importation of the very same drugs which were the subject of the overt act in the indictment in the Southern District, they should in effect be sentenced to consecutive time?

Clearly, in this case and under the particular circumstances herein, the defendants should receive credit from June 11, 1973 to the date of their sentence on March 5, 1976.

In evaluating the words of Section 3568, to wit:

> "...The Attorney General shall give any person credit toward service of sentence for any days spent in custody in connection with the offense or acts for which sentence was imposed."
> (Emphasis Supplied)

it is not a far fetched interpretation in the context of the instant case to hold that the defendant was being held in custody since the date of his arrest in connection with the act set forth in the instant indictment and for which sentence was imposed.

This writer is mindful of Aldrige v. United States, 405 F.2d 831 (CA 9 1969) wherein that court held there is a conclusive presumption that credit was given where the record is unclear. However, in that case,

after sentencing, the Judge in his order denying a Rule 35 Motion, stated affirmatively that he did take into consideration the time defendants spent in custody awaiting trial. In the instant case, no Rule 35 Motion was made. In addition, there is nothing in the judgment in this case signed by the sentencing Judge, with reference to not giving credit for time served. It might be noted, GOMEZ was not the subject of this supposed extension of sentence. Finally, and most important, the Aldrige case was decided on the basis of Section 3568, prior to the 1966 Amendment.

POINT III

THE COURT ERRED IN NOT DISMISSING THE INDICTMENT BECAUSE OF A VARIANCE BETWEEN PROOF AND INDICTMENT

Defendants, PARRA and GOMEZ refer this Court to appellants Joint Brief, Point I with respect to this issue. It should merely be pointed out that both PARRA and GOMEZ were on the lowest rung of the Segment I Conspiracy even accepting the Government's case completely (as we are bound to do for the purposes of this appeal). There is no evidence, nor can any reasonable view of the evidence cause one to draw a different inference. This Court has repeatedly held that where there is a variance between indictment and proof by a showing of multiple conspiracies and a defendant is found to be a member of only one conspiracy with a showing of "prejudicial spillover" there is error requiring reversal. U.S. v. Bertolotti, 520 F.2d 149 (CA 2, 1975); U.S. v. Sperling, 505 F.2d 1323 (CA 2, 1974).

In the case at bar, PARRA and GOMEZ were at most couriers unaware of the extent of Conspiracy One and not even aware of the existence of Conspiracy Two and Three. The testimony of Andries, Fernandez and the seizures of individuals not on trial was so prejudicial

as to make a fair trial impossible. Indeed the rapidity with which the jury convicted all defendants bears witness to this spillover effect.

After a thirteen week trial, the jury had apparently reached a verdict in less than one day. The testimony with respect to the amount of money Andries and Pepe made and the threats and criminal activities of Andries were so infamatory as to make a fair trial to defendants PARRA and GOMEZ in the context of this trial impossible. Indeed this Court has the power to dismiss as against appellants in the context of its supervisory role and in the context of appellants 10 year sentence in Texas such action would be in the interests of justice. U.S. v. Estepa, 471 F 2nd 1132 (CA 2, 1972).

POINT I

THE COURT ERRED IN FAILING TO DISMISS THIS INDICTMENT FOR UNDUE PRE-TRIAL DELAY

Appellants refer the Court to Point III of appellant ROLDAN's brief and Point II of defendant, GONZALES' brief. Defendants, PARRA and GOMEZ, were under indictment from May 11, 1974 until the trial October 20, 1975, a period of seventeen months. Although the indictment was amended and superseded on five (5) separate occasions, the delay was nevertheless real and prejudice after such a lengthy delay, is presumed.

POINT V

APPELLANTS ADOPT ALL OTHER POINTS OF OTHER COUNSEL HAVING APPLICATION AND IN PARTICULAR THE BRIEF OF APPELLANT BOTERO WITH RESPECT TO PIECEMEAL PROSECUTION.

CONCLUSION

THIS COURT SHOULD REVERSE THE JUDGMENTS OF CONVICTION BELOW AND DISMISS THE INDICTMENT OR IN THE ALTERNATIVE DIRECT THE ATTORNEY GENERAL OF THE UNITED STATES TO AWARD CREDIT TO THE APPELLANTS FOR TIME SERVED FROM JUNE 11, 1973 TOWARDS THE PRESENT SENTENCE.

Dated: June 10, 1976.

Respectfully submitted,

LEONARD J. LEVENSON, ESQ.
Attorney for William
Rodriguez-Parra

MARTIN GOTKIN, ESQ.
Attorney for Olegario
Montes-Gomez

UNITED STATES DISTRICT COURT
FOR THE

35-578

WESTERN JUDICIAL DISTRICT OF TEXAS

Magistrate's Docket No. B8

Case No. 3929

UNITED STATES OF AMERICA

v

William RODRIGUEZ-Parra (age-33)
Olegario MONTES-Gomez (age-30)

COMPLAINT for VIOLATION of

U.S.C. Title 21

Section 952(a), 960(a)(1), 963, 841(a)(1), 846

BEFORE JOHN P. GILES
Name of Magistrate

San Antonio, Texas
Address of Magistrate

The undersigned complainant being duly sworn states:

That beginning on or about June 5, 1973, and continuing to on or about June 12, 1973, in Colombia; Panama; Guatemala; Merida, Mexico; Monterrey, Mexico and San Antonio, Bexar County, Texas, in the Western District of Texas,

(1) William RODRIGUEZ-Parra, Olegario MONTES-Gomez and others

did(2) knowingly, unlawfully and intentionally combine, conspire, confederat and agree together and with each other to commit offenses against the United States to wit: to knowingly, unlawfully and intentionally import into the United States from the Republic of Mexico approximately 2,200 grams of cocaine, a Schedule II narcotic drug controlled substance in violation of Title 21, United States Code, Section 952(a), all in violation of Title 21, United States Code, Section 960(a)(1); and did knowingly, unlawfully and intentionally possess with intent to distribute said quantity of cocaine in violation of Title 21, United States Code, Section 841(a)(1).

And the complainant states that this complaint is based on the fact that on June 12, 1973, that Defendant MONTES was found to be in possession of approximately 1,543 grams of cocaine upon arrival at the San Antonio International Airport from the Republic of Mexico, and was accompanied by Defendant RODRIGUEZ; that RODRIGUEZ was found to be in possession of approximately 657 grams of cocaine; that upon the persons of Defendants RODRIGUEZ and MONTES was found certain documents which indicate that they travelled together from Colombia to the United States; that the fact that both defendants stated that they were both destined to the same hotel in Dallas, Texas, where each would be contacted subsequent to his arrival by the recipient(s) of the contraband.

And the complainant further states that he believes that U. S. Customs Inspectors Fel T. Stoker and Nicholas Goldstein; Acting Customs Patrol Officers William Pulten and Guadalupe Alderete, and Special Agents James A. Lindsey and Albert D. Latson, all U. S. Customs, San Antonio, Texas.

are material witnesses in relation to this charge.

Albert D. Latson
Signature of Complainant.
Special Agent, United States Customs
Official Title.

Sworn to before me, and subscribed in my presence, June 15, 1973.

United States Magistrate.

(1) Insert name of accused.
(2) Insert statement of the essential facts constituting the offense charged.

Leonard J. Levenson, affirms under-
penalty of Perjury:

1. On July 21, 1976 I mailed a copy of the attached Corrected Brief to the US Atty's Office, 1 St Andrews Plaza, New York, Ny. by enclosing same in a first paid wrapper directed to US atty's office.

2. I am not a party to this action.

Leonard J. Levenson

Affirmed this 21st Day
of July, 1976